Sarikei District Council v Hamzah bin Kiprawi & Ors

HIGH COURT (SIBU) — CRIMINAL APPEAL NO 20-41-1 OF 1995
TEE AH SING J
19 NOVEMBER 1996

Criminal Procedure *— Appeal — Procedures for, principles governing — Notice of appeal not specify that appellant is desirous of appealing to the High Court — Whether omission was material — Whether appeal was defective and bad in law — Criminal Procedure Code (FMS Cap 6) s 307*

Criminal Procedure *— Appeal — Right to conduct appeal — Whether advocate employed by local district council has power to conduct appeal of non-seizable offence — Criminal Procedure Code (FMS Cap 6) ss 2(1), 307(i), 380(ii)(b) & First Schedule*

Criminal Procedure *— Prosecution — Right to conduct prosecution — Whether advocate employed by local district council has power to conduct prosecution of non-seizable offence — Criminal Procedure Code (FMS Cap 6) ss 2(1), 307(i), 380(ii)(b) & First Schedule*

The appellant was the local authority of Sarikei. The respondents were charged by the appellant with three charges under s 58 of the Local Authority Ordinance, by-law 9 of the Sarikei District Council (Hawking) By-laws and by-law 3(1)(d) of the Sarikei District Council (Anti Litter) By-laws 1983 respectively. The magistrate held that the charges were seizable offences and subsequently dismissed the charges.

In this appeal, the deputy public prosecutor informed the court that the Public Prosecutor was not a party and that there was no written permission for the counsel of the appellant to appear on behalf of the Public Prosecutor. Counsel for the respondents raised several preliminary objections to the appeal: (a) that the notice of appeal was bad in law as it failed to express the intention to appeal; (b) that the advocate representing the appellant was not 'a person employed by any local authority' as understood under s 380(ii)(b) of the Criminal Procedure Code (FMS Cap 6) ('the Code'); therefore he could not appear and conduct the prosecution on behalf of the appellant for the offences which was the duty of the appellant to enforce; (c) that the appeal was improperly brought as it was not lodged by the Public Prosecutor; and (d) learned counsel for the appellant had no right to appear in the appeal as he had not been expressly authorized in writing to do so by the Public Prosecutor.

Held, setting aside the magistrate's order:

(1) In the body of the notice of appeal, it was not stated that the appellant was desirous of appealing to the High Court against the order. The omission was material and therefore the appeal was defective and bad in law (see p 334A–B).

(2) The grounds of appeal was not entitled 'Petition of Appeal'. This omission was not fatal. The contents of the grounds of appeal

had complied with the requirements of s 307(vi) of the Code. However, if the court was wrong in this, this omission was curable under s 310 of the Code (see p 334D).

(3) The three charges were in respect of non-seizable offences. Therefore, the learned magistrate erred when he held that the three charges were seizable offences and the proceedings could be instituted in the name of the appellant instead of in the name of the Public Prosecutor (see p 335C–D).

(4) Section 380(ii)(b) of the Code uses the words 'any person' instead of 'any advocate' or 'any employee'. Further, the word 'employed' is used and not the word 'employee'. If the word 'employee' is used, then it refers to a contract of employment. Since the word used is 'employed', the meaning given to the words 'any person employed' is that this person need not have a contract of employment. Since the advocate was employed by the appellant, then by virtue of s 380(ii)(b) of the Code, the advocate may appear and conduct the prosecution on behalf of the local authority (see p 335E–I).

(5) Under s 307(i) of the Code, as the appellant was dissatisfied with the judgment pronounced by the magistrate in a criminal case to which it was a party, it may prefer an appeal to the High Court against such a decision. The appellant could file the notice of appeal and no sanction of the Public Prosecutor was required (see p 336G); *Hardial Singh v Faridah bte Haron & Ors* [1988] 2 MLJ 465 followed.

(6) In respect of an appeal against a decision of magistrate pertaining to a non-seizable offence, the notice of appeal can be lodged in the name of the complainant and not in the name of the Public Prosecutor. Section 378 of the Code applies where the prosecution offences are done in the name of the Public Prosecutor and the appeal therefrom is instituted in the name of the Public Prosecutor. In the instant case, the appeal was lodged by the appellant and therefore the learned counsel appeared on behalf of the appellant and not on behalf of the Public Prosecutor. As such, s 378 of the Code did not apply (see p 337D–F).

[Bahasa Malaysia summary

Perayu merupakan pihak berkuasa Sarikei. Penentang-penentang telah dipertuduhkan oleh perayu dengan tiga tuduhan di bawah s 58 Ordinan Pihak Berkuasa Tempatan, undang-undang kecil 9 Undang-undang Kecil (Penjajaan) Majlis Daerah Sarikei dan undang-undang kecil 3(1)(d) Undang-undang Kecil (Anti Litter) Majlis Daerah Sarikei 1983 masing-masing. Majistret memutuskan bahawa pertuduhan tersebut adalah kesalahan boleh tangkap lalu menolak pertuduhan-pertuduhan tersebut.

Dalam rayuan ini, timbalan pendakwa raya memberitahu mahkamah bahawa Pendakwa Raya bukanlah suatu pihak kepada

dan bahawa tidak terdapat kebenaran bertulis untuk peguam perayu hadir bagi pihak Pendakwa Raya. Peguam penentang-penentang menimbulkan beberapa bantahan permulaan terhadap rayuan: (a) bahawa notis rayuan adalah tidak elok dari segi undang-undang kerana ia gagal menyatakan hasrat untuk merayu; (b) bahawa peguambela yang mewakili perayu bukanlah 'mana-mana orang yang digajikan oleh pihak berkuasa tempatan' seperti yang difahamkan di bawah s 380(ii)(b) Kanun Acara Jenayah (NMB Bab 6) ('Kanun tersebut'); maka beliau tidak boleh hadir dan menjalankan pendakwaan bagi pihak perayu atas kesalahan yang wajib dikuatkuasakan oleh perayu; (c) bahawa rayuan tidak dibawa dengan betul kerana ia tidak dikemukakan oleh Pendakwa Raya; dan (d) peguam terpelajar perayu tidak berhak menghadiri rayuan kerana beliau telah tidak diberikuasa secara nyata dan bertulis untuk berbuat demikian oleh Pendakwa Raya.

Diputuskan, mengetepikan perintah majistret:

(1) Dalam badan notis rayuan, ia tidak dinyatakan bahawa perayu ingin merayu kepada Mahkamah Tinggi terhadap perintah itu. Peninggalan ini adalah material dan maka rayuan adalah cacat dan tidak elok dari segi undang-undang (lihat ms 334A–B).

(2) Alasan rayuan tidak bertajuk 'Petisyen Rayuan'. Peninggalan ini tidak padah. Kandungan alasan rayuan telah mematuhi keperluan s 307(vi) Kanun tersebut. Walau bagaimanapun, jika mahkamah tersilap dalam perkara ini, peninggalan boleh dipulihkan di bawah s 310 Kanun tersebut (lihat ms 334D).

(3) Ketiga-tiga pertuduhan adalah berhubung dengan kesalahan tak boleh tangkap. Maka, majistret yang arif tersilap apabila beliau memutuskan bahawa ketiga-tiga pertuduhan adalah kesalahan boleh tangkap dan prosiding boleh dimulakan dalam nama perayu dan bukan dalam nama Pendakwa Raya (lihat ms 335C–D).

(4) Seksyen 380(ii)(b) Kanun tersebut menggunakan perkataan-perkataan 'mana-mana orang' dan bukan 'mana-mana peguambela' atau 'mana-mana pekerja'. Selanjutnya, perkataan 'digajikan' digunakan dan bukan perkataan 'pekerja'. Jika perkataan 'pekerja' digunakan, maka ia merujuk kepada suatu kontrak penggajian. Oleh kerana perkataan yang digunakan adalah 'digajikan', makna yang diberikan kepada perkataan-perkataan 'mana-mana orang yang digajikan' adalah bahawa orang ini tidak memerlukan kontrak penggajian. Oleh kerana peguambela digajikan oleh perayu, maka disebabkan s 380(ii)(b) Kanun tersebut, peguambela boleh hadir dan menjalankan pendakwaan bagi pihak pihak berkuasa tempatan (lihat ms 335E–I).

(5) Di bawah s 307(i) Kanun tersebut, oleh kerana perayu tidak berpuas hati dengan penghakiman yang diumumkan oleh majistret dalam suatu kes jenayah kepada mana ia merupakan suatu pihak, ia boleh membuat rayuan kepada Mahkamah Tinggi terhadap

keputusan sedemikian. Perayu boleh memfailkan notis rayuan dan sanksi Pendakwa Raya tidak dikehendaki (lihat ms 336G); *Hardial Singh v Faridah bte Haron & Ors* [1988] 2 MLJ 465 diikut.

(6) Mengenai rayuan terhadap keputusan majistret berkaitan dengan kesalahan tak boleh tangkap, notis rayuan boleh dikemukakan dalam nama pengadu dan bukan dalam nama Pendakwa Raya. Seksyen 378 Kanun tersebut terpakai apabila kesalahan pendakwaan dilakukan dalam nama Pendakwa Raya dan rayuan daripadanya dimulakan dalam nama Pendakwa Raya. Dalam kes ini, rayuan dikemukakan oleh oleh perayu dan dengan itu peguam terpelajar hadir bagi pihak perayu dan bukan bagi pihak Pendakwa Raya. Oleh yang demikian, s 378 Kanun tersebut tidak terpakai (lihat ms 337D–F).]

Notes

For cases on procedures and principles governing appeal, see 5 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 360–374.

For a case on right to conduct prosecution, see 5 *Mallal's Digest* (4th Ed, 1994 Reissue) para 2040.

Cases referred to

Hardial Sing v Faridah bte Haron & Ors [1988] 2 MLJ 465 (folld)
Masnelan Pakpahan v PP [1989] 2 MLJ 362 (refd)
Municipal Commissioner, Malacca v Teh Chwee Swi [1971] 2 MLJ 274 (refd)
PP v Joehari bin Abdullah [1996] 5 MLJ 324 (refd)
Radha Krishna Naidu, Re [1962] MLJ 130 (refd)
Veerasingam v PP [1958] MLJ 76 (refd)
Yek Tieng Sing & Ors v PP [1971] 2 MLJ 94 (refd)

Legislation referred to

Criminal Procedure Code (FMS Cap 6) ss 2(i), 306, 307(i), (vi), 310, 325, 377(a), 378, 379, 380(ii)(b), First Schedule
Interpretation Acts 1948 and 1967 s 3
Local Authority Ordinance (Sarawak Cap 117) ss 5, 58
Sarikei District Council (Hawking) By-Laws by-law 9
Sarikei District Council (Anti-Litter) By-Laws 1983 by-law 3(1)(d)

Chew Peng Hui (*Battenberg & Talma*) for the appellant.
Chong Siew Chiang (*Chong Brothers*) for the respondents.

Cur Adv Vult

Tee Ah Sing J: In this appeal, the respondents were charged with three charges, namely:

(1) for an offence punishable under s 58 of the Local Authority Ordinance (Sarawak Cap 117);

(2) for an offence punishable under by-law 9 of the Sarikei District Council (Hawking) By-Laws; and

(3) for an offence punishable under by-law 3(1)(d) of the Sarikei District Council (Anti-Litter) By-Laws 1983.

On 1 October 1996, when this appeal came up for hearing, Mr Awang Armadajaya, the deputy public prosecutor ('DPP') informed the court that the Public Prosecutor was not a party and therefore would not be making any submissions. The learned DPP also told the court that there was no written permission for Dr Chew Peng Hui to appear on behalf of the Public Prosecutor.

Dr Chew Peng Hui, learned counsel for the appellant, submitted that there were actually three matters before the court. First, there was the appeal proper. Secondly, there was the preliminary objection by the respondents to the appeal. Thirdly, there was the application by the appellant made under s 310 of the Criminal Procedure Code (FMS Cap 6) ('the Code'). The application under s 310 of the Code was only relevant if the preliminary objection was held against him and if his application under s 310 is unsuccessful, then he is applying for criminal revision.

The learned counsel for the respondents in his written submission contended that the appellant's notice of motion ought to be dismissed on the following grounds:

(a) The notice of appeal was bad in law. It failed to express the intention to appeal in the said notice.

(b) The petition of appeal was also bad under s 307(vi) of the Code. By the word 'shall' in s 307(vi), it is mandatory to state shortly the substance of the judgment, non-compliance of which, renders the appeal incompetent. In support, the case of *Yek Tieng Sing & Ors v PP* [1971] 2 MLJ 94 was cited.

(c) The affidavit of Kho Pek Choo in support of the motion was inadequate on the strength of the decision in *Masnelan Pakpahon v PP* [1989] 2 MLJ 362.

(d) The appeal was also improperly brought because s 306 of the Code had not been complied with as the appeal was not lodged by nor with the sanction in writing of the Public Prosecutor.

In support, the following cases were cited: (a) *Re Radha Krishna Naidu* [1962] MLJ 131; (b) *PP v Joehari bin Abdullah* [1996] 5 MLJ 324; and (c) *Hardial Singh v Faridah bte Haron & Ors* [1988] 2 MLJ 465.

(e) By virtue of ss 378 and 379 of the Code, the learned counsel for the appellant had no right to appear in this appeal as he had not been expressly authorized in writing to do so by the Public Prosecutor.

The learned counsel for the appellant submitted that in respect of the notice of appeal, there was substantial compliance with s 307 of the Code. He also submitted that the heading of the notice of appeal says 'Notice of Appeal' and anyone reading that notice would be quite clear that it is a

document intending to appeal against the decision of the lower court. In respect of the petition of appeal, it is submitted there was substantial compliance. He also submitted that there was no prejudice to the respondents as it is not a case where the respondents did not know what was before the court in this appeal. He also submitted that the Public Prosecutor has not indicated that he has any objections to the appeal or that he is minded to take over the appeal.

The learned counsel for the appellant urged the court to invoke s 310 of the Code so that substantial justice may be done as in *Veerasingam v PP* [1958] MLJ 76.

In this case, there had merely been a dismissal of the charges. This is not an appeal against an acquittal, so s 306 of the Code has no operation. It was submitted that the learned magistrate was wrong in holding that the offence were seizable offences.

It was further submitted that in respect of non-seizable offences, the proceedings can be instituted in the name of the Sarikei District Council instead of in the name of the Public Prosecutor. In support, the cases *Hardial Singh v Faridah bte Haron & Ors* and *Municipal Commissioner, Malacca v Teh Chwee Swi* [1971] 2 MLJ 274 were cited.

It was also submitted that in the case counsel appearing for the complainant will not be appearing for the Public Prosecutor and so not within s 378 of the Code. In other words, s 378 of the Code applies only in appeals where the Public Prosecutor is directly involved in the sense that his name is directly used in the institution of the prosecution.

He further submitted that s 379 only applies to the Federal Government because 'Government' in s 379 is defined by the Interpretation Act to mean the Federal Government.

The learned counsel for the respondents in reply contended that the headline 'Notice of Appeal' is merely in form. The most important thing is the contents. When we read the contents, it is neither here nor there. The petition of appeal has not complied with the requirements of the Code because it failed to give the substance of the judgment appealed.

It was submitted any person employed by a local authority does not include an advocate. The person employed by the local authority means the employee of the local authority who is a fulltime worker and who is paid from public funds and is a public servant. An advocate engaged or retained by the local authority is not within this class of people.

The notice of appeal reads as follows:

Notice of Appeal

Take notice that the Sarikei District Council, Sarikei, the complainant in these cases, being dissatisfied with the order of the Honourable Magistrate, En Awang Krisnada bin Awang Mahmud made on 19 June 1995 dismissing the charges against the above accused persons, on the ground that the proceedings against them had been a nullity.

Dated 21 June 1995.

In the body of the notice of appeal, it is not expressly stated that the appellant is desirous of appealing to the High Court against the said order.

In other words, the appellant had omitted to add in the words 'appeals to the High Court against the said order' after the word 'nullity'. I am of the view that the omission is material and therefore I agree with the contention of the learned counsel for the respondent that the notice of appeal is defective and bad in law.

Paragraph 4 of the affidavit of Kho Pek Cho affirmed on 20 March 1996 reads as follows:

> 4 In typing the petition of appeal in this case, I had inadvertently omitted to type in the heading 'Petition of Appeal'. I had not followed Form L1 of the Second Schedule in the Criminal Procedure Code because s 307 of the Code does not specifically direct that the said form is to be used. I had merely used the format the office has all along been using.

I have perused the grounds of appeal. It is not entitled 'Petition of Appeal'. I am of the view that this omission is not fatal. The contents of the grounds of appeal have complied with the requirements of s 307(vi) of the Code. However, if I am wrong in this, this omission is curable under s 310 of the Code.

Under s 2(i) of the Code, a 'non-seizable offence' means an offence for which, and a 'non-seizable case' means a case in which, a police officer may not ordinarily arrest without warrant according to the third column of the First Schedule.

The First Schedule under 'Offences Against Laws Other Than the Penal Code' reads as follows:

Offences Against Laws Other Than The Penal Code

If punishable with death, or imprisonment for seven years or upwards	May arrest without warrant	Warrant	Not bailable	Not compoundable
If punishable with imprisonment for three years and upwards, but less than seven years	do.	do.	do.	do.
If punishable with imprison-ment for less than three years	Shall not arrest without warrant	Summons	Bailable	do.
If punishable with fine only	do.	do.	do.	do.

The punishment for the first charge under s 58 of the Local Authority Ordinance is imprisonment for three months and a fine of RM500. It is

A clear from the second and third columns of the First Schedule to the Code that the first charge is in respect of a non-seizable offence.

The punishment for the second charge under by-law 9 of the Sarikei District Council (Hawking) By-Laws is a fine of RM200 and in the case of a continuing offence, an additional fine of RM10 for every day during B which such offence continues. It is clear from the second and third columns of the First Schedule to the Code that the second charge is in respect of a non-seizable offence.

The punishment for the third charge under by-law 3(1)(d) of the Sarikei District Council (Anti-Litter) By-Laws 1983 is a fine of RM500. It C is clear from the second and third columns of the First Schedule to the Code that the third charge is in respect of a non-seizable offence.

Since I am of the view that the three charges are in respect of non-seizable offences, the provisions of s 377(a) of the Code are inapplicable as this section is in respect of a seizable offence.

D Therefore, the learned magistrate erred when he held that the three charges were of seizable offences.

I agree with the contention of the learned counsel for the appellant that in respect of non-seizable offences the proceedings can be instituted in the name of the Sarikei District Council instead of in the name of the Public Prosecutor.

E And I am of the view that the applicable provision is s 380(ii)(b) of the Code. The relevant part read as follows:

> 380 Notwithstanding anything in this Chapter contained —
>
> ...
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> F (ii) in summary non-seizable cases in the Court of a Magistrate —
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> ...
>
> (b) any officer of any Government department or of any local authority or statutory authority or any person employed by any local authority or statutory authority may appear and conduct any prosecution for an offence against any written law which it is the duty of the G same department or authority specially to enforce; ... .

So, under s 380(ii)(b) of the Code what do the words 'any person employed by any local authority' mean?

This section uses the words 'any person' instead of the words 'any H advocate' or 'any employee'. Further, the word 'employed' is used and not 'employee'. If the word 'employee' is used, then it refers to a contract of employment. Since the word used is 'employed', the meaning given to the words 'any person employed' is that this person need not have a contract of employment.

I I am of the view that an advocate is a person.

Since the advocate is employed by the Sarikei District Council, then by virtue of s 380(ii)(b) of the Code, the advocate may appear and conduct the prosecution on behalf of the local authority, ie the Sarikei District Council, for the three offences which is the duty of the Sarikei District Council to enforce.

In p 36 of the appeal record, the learned magistrate in his ruling said: A

> It is a nullity from the beginning and I order all the charges against all the accused person to be dismissed accordingly.

I shall now deal with s 306 of the Code.

Section 306 provides as follows: B

> 306 When an accused person has been acquitted by a Magistrate there shall be no appeal except by, or with the sanction in writing of the Public Prosecutor.

The case of *Re Radha Krishna Naidu* [1962] MLJ 130 cited by the learned counsel for the respondents decided that when an accused person is C acquitted, only the Public Prosecutor may appeal but in the present case the respondent were not acquitted in the lower court.

Since the respondents were not acquitted by the learned magistrate, s 306 is not applicable.

The relevant part of s 307(i) of the Code reads as follows: D

> 307 (i) ... any person who is dissatisfied with any judgment, sentence or order pronounce by any Magistrate's Court in a criminal case or matter, to which he is a party may prefer an appeal to the High Court against such judgment, sentence or order ... .

Section 5 of the Local Authority Ordinance provides as follows: E

> 5 Every local authority constituted under this Ordinance, other than an individual person shall be a body corporate with perpetual succession and a common seal and may sue and be sued in the corporate name.

Under s 3 of the Interpretation Acts 1948 and 1967, the word 'person' F includes a body of persons, corporate or unincorporate.

So it is clear that the Sarikei District Council is a person.

And under s 307(i), as the Sarikei District Council is dissatisfied with the judgment pronounced by the magistrate's court in a criminal case to which it is a party, it may prefer an appeal to the High Court against such G decision. I am of the view that the Sarikei District Council can file this notice of appeal and no sanction of the Public Prosecutor is required.

I can do no better than cite the case of *Hardial Singh v Faridah bt Haron & Ors* [1988] 2 MLJ 465 at pp 469 and 470 where KC Vohrah J said:

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> To sum up, what needs to be borne in mind is the distinction between the right of appeal and the right of audience in the High Court. It is clear there is a right of appeal given to a private complainant under s 307(i) save that he cannot appeal where the defendant he prosecutes is acquitted except with the sanction of the Public Prosecutor (see s 306). It seems to me that if he has a right of appeal, as a corollary, he also has the right of audience I in the High Court on the hearing of the appeal otherwise the right of appeal becomes an illusory right if there is no one to represent the appellant in the High Court. But where the Public Prosecutor becomes cognizant of the criminal appeal by the private complainant and he decides to intervene in

A the appeal (and the Public Prosecutor by s 376 has the control and direction of all criminal proceedings which include criminal appeals) the Public Prosecutor then becomes directly involved in the appeal and in that case either the Public Prosecutor on his behalf or any of the persons enumerated in s 378 on behalf of the Public Prosecutor will have the right of audience in the High Court. The Public Prosecutor steps into the shoes of the private B complainant qua appellant; the Public Prosecutor is the appellant and the private complainant then no longer has the right of audience in the appeal before the High Court.

I am in full agreement with KC Vohrah J. Since the Sarikei District Council has a right of appeal, it also had the right of audience in the High C Court on the hearing of the appeal, otherwise the right of appeal becomes an illusory right if there is no one to represent the appellant in the High Court.

I am further of the view that in respect of an appeal against the decision of a magistrate pertaining to a non-seizable offence, the notice of appeal can be lodged in the name of the complainant and not in the name of the Public Prosecutor.

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Section 378 of the Code provides as follows:

> 378 No person shall appear on behalf of the Public Prosecutor on any criminal appeal other than the Public Prosecutor or a Deputy Public Prosecutor or a police officer not below the rank of Inspector or an advocate expressly authorized in writing by the Public Prosecutor or by E a Deputy Public Prosecutor, acting on behalf of the Public Prosecutor.

Section 378 of the Code applies where the prosecution of the offences is done in the name of the Public Prosecutor and the appeal therefrom is instituted in the name of the Public Prosecutor.

In the instant case, the appeal is lodged by the Sarikei District F Council and therefore the learned counsel is appearing on behalf of the Sarikei District Council and not on behalf of the Public Prosecutor. As such s 378 of the Code does not apply.

Further, as the learned DPP has not indicated that he is opposing the appeal and also taking over the conduct of the appeal, I am of the G considered view that the learned counsel for the appellant has a right of audience in the High Court at the hearing of this appeal.

As the notice of appeal is bad in law, there is no proper appeal before this court. However, as I am of the view that the learned magistrate has erred in law in making the said order, this is a fit and proper case for H revision.

In the exercise of my power of revision under s 325 of the Code, I set aside the order of the learned magistrate. Since the learned magistrate has been transferred, I order that the case be heard de novo before another magistrate.

I *Order accordingly.*

Reported by Eugene Lee Hong Whye